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No. _____

In The

Supreme Court of the United States

October Term, 1986

LUANN K. WALSH,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Court of Appeals for the Eighth Circuit correctly interpreted the collective bargaining agreement before it?

2) Whether the decision of the United States District Court for the District of Nebraska usurped the authority vested by Congress in Public Law Boards under 45 USC § 153 as found by the Court of Appeals?

3) Whether the Court of Appeals for the Eighth Circuit erred in finding that Public Law Board No. 3314 had authority to exercise discretion in formulating a remedy and in finding that the award drew its essence from the collective bargaining agreement before it?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

LUANN K. WALSH, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on October 14, 1986.

OPINIONS BELOW

The October 14, 1986 opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 803 F2d 412 (8th Cir. 1986), and is reprinted in Appendix 1. The prior opinions of the United States District Court for the District of Nebraska, are reprinted in Appendix 11, 18 and are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 14, 1986. On January 23, 1987, the Petition For Rehearing En Banc and Petition For Rehearing by the three judge panel was denied. (See Appendix 29). The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTE INVOLVED

45 USC § 153 First (q)

If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees

or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the Clerk of the Court to the Adjustment Board. The Adjustment Board shall file in the Court the record of the proceedings on which it based its action. The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

The judgment of the Court shall be subject to review as provided in Sections 1291 and 1254 of Title 28, United States Code [28 USC §§ 1254, 1291].

STATEMENT OF THE CASE

On August 8, 1977, the Petitioner, LUANN K. WALSH (hereinafter referred to as "Petitioner"), was fired from her job as an employee of the Respondent, UNION PACIFIC RAILROAD COMPANY (hereinafter referred to as "Respondent"). Petitioner pursued a grievance which ultimately resulted in her claim being submitted to Public

Law Board No. 3314 for a determination of her claims for reinstatement with full seniority, back pay and benefits.

On June 30, 1983, Public Law Board No. 3314, at Case No. 4, Award No. 4, ordered Petitioner reinstated with seniority unimpaired but without any back pay or benefits.

On November 29, 1983, Petitioner filed a Complaint in the United States District Court for the District of Nebraska, CV83-0-806, alleging jurisdiction under the Railway Labor Act, 45 USC §§ 151-188. Petitioner's Complaint demanded back pay and benefits due her from the date of her discharge to the date of reinstatement. The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska, entered an Order on January 25, 1985, granting summary judgment to Petitioner on her second cause of action (pertaining to the decision of Public Law Board No. 3314) regarding her claims for back pay and benefits. (See Appendix 11). Evidence as to the amount of back pay and benefits due to Petitioner was to be presented at the trial on Petitioner's first cause of action.

Following a trial on Petitioner's first cause of action, an Order was entered by the Honorable C. Arlen Beam on September 30, 1985, awarding Petitioner the sum of $130,253.63 for the back pay and benefits due her on her second cause of action. (See Appendix 27).

The Respondent appealed the Orders of the United States District Court for the District of Nebraska dated January 25, 1985, and September 30, 1985, under CV83-0-806 to the United States Court of Appeals for the Eighth Circuit. The issues before the Court of Appeals involved the interpretation of Petitioner's collective bargaining

agreement in effect at the time of her discharge, and a Memorandum of Agreement (See Appendix 30), entered into between Petitioner's Union and Respondent on December 21, 1982, regarding the parameters of Public Law Board No. 3314. Specifically, the relevant provisions of each of the aforesaid documents are as follows:

Rule 45 (c) of the Petitioner's collective bargaining agreement states:

> If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be reinstated and compensated for any loss of wages.

The Memorandum of Agreement stated in part:

> (2) The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules.

When Public Law Board No. 3314 rendered its decision in Award No. 4, it specifically found that "the record does not support termination", and in so doing, the Board of course found the charges against the Petitioner were not sustained. The Honorable C. Arlen Beam, in granting back pay and benefits to the Petitioner, specifically relied upon Rule 45 as the basis for his decision.

The majority in the Court of Appeals decision (the decision in Petitioner's case before the three judge panel of the United States Court of Appeals for the Eighth Cir-

cuit was 2 to 1 in favor of the Respondent) relied on *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. at 593 (1960), as justisfying the arbitrator in fashioning an award in the case at bar. This reasoning expressly ignores Rule 45 (c) and the Memorandum of Agreement in the case at bar limiting the authority of the arbitrator to fashion an award. In the *American Mfg. Co.* and *Enterprise Wheel* cases the collective bargaining agreements did not have language expressly limiting the authority of the arbitrator to fashion an award. Reliance on these cases by the majority in the Court of Appeals was therefore misplaced.

It is only when a collective bargaining agreement allows an arbitrator discretion in fashioning an award that flexibility may be exercised. There was no flexibility granted to fashion an award in the case at bar. Rule 45 (c) of the collective bargaining specifically mandated an award of back pay when the charges against the Petitioner were not sustained.

As stated in *Resilient Floor, Etc. v. Welco Mfg. Co., Inc.*, 542 F2d 1029 (8th Cir. 1976), at p. 1033:

> The parties could have negotiated a contract designed to confine the arbitrator's power to awards of full back pay or no back pay exclusively.

Petitioner submits this is precisely what Rule 45(c) of her collective bargaining agreement did in the case at bar. When charges are sustained the employee gets no back pay and when charges are not sustained full back pay is

mandated. Any other interpretation renders Rule 45(c) meaningless.

The majority decision of the Court of Appeals relies upon cases where the collective bargaining agreement allowed flexibility in fashioning an award but fails to recognize that such flexibility was not present in the case at bar. As stated by the Court in *Int. U. of Operating Engineers v. Shank-Artukvich*, 751 F2d 364 (10th Cir. 1985), p. 366, after noting the narrow scope of judicial review of an arbitration award:

> [4] Article VII, § 5 of the collective bargaining agreement at issue here contains express language that required the employer to pay damages if it violates the manning provision of the agreement. The agreement is unequivocal:
>
> > If violations of the manning provisions . . . are found by . . . the Arbitrator and if an individual is found entitled to back pay, the same shall be paid by the violator, but if no individual is found entitled to damages the violator shall remit such damages to the Trustees of the Colorado Journeymen and Apprentice Training Fund for Operating Engineers.
>
> The plain language of the agreement contemplates damages whenever the employer violates the manning provisions of the agreement. If no individual is entitled to damages, the agreement requires the employer to pay damages to the union training fund.
>
> The arbitrator found that the employer had violated the manning provisions of the agreement. He also concluded that no individual was entitled to back pay. However, he ruled that the employer was not required to pay damages to the union training fund. His decision did not draw its essence from the col-

> lective bargaining agreement. It was contrary to the express terms of the agreement.

The right to limit the authority of a Board of Arbitration to the specific terms of an existing collective bargaining agreement was also recognized in *Local 1837, Intern. Broth. v. Maine Public Service Co.*, 579 F. Supp. 744 (D. Maine 1984). In the *Maine* case, the Board of Arbitration had its authority limited by language very similar to that contained in the Memorandum of Agreement in the case at bar. The relevant language in the *Maine* case at p. 748 provided:

> Section 4. No Board of Arbitration shall have the power to add to, or subtract from, or modify any of the terms of this Agreement, or pass upon or decide any question except the grievance submitted to the Board in accordance with the foregoing provision. No award or decision of a Board of Arbitration shall be retroactive for more than sixty (60) days before the grievance was reduced to writing as provided in the grievance procedure.

The Court in *Maine* then stated at p. 748 regarding this language:

> Such provisions effectively limit the arbitral power to fashion remedies.

In the *Maine* case, despite the language limiting its power, the Board of Arbitration proceeded to adopt a company practice which unilaterally modified existing terms of the collective bargaining agreement. The court in *Maine* at p. 749 found:

> Therefore, it cannot be said that the remedy draws its essence from the Agreement.

and at p. 754 in setting aside the decision of the Board the court stated:

> The Board was commissioned to interpret and apply the Agreement, yet its remedy award contravenes unambiguous provisions of the Agreement, which were neither waived nor modified.

This is virtually identical to what Public Law No. 3314 in rendering Award No. 4 did in the case at bar. After having its power to change existing rules or to write new rules expressly taken away, the Board ignored the express provisions of Rule 45 (c) of the then existing collective bargaining agreement when it refused to award back pay to Petitioner. It would be a far different situation if the collective bargaining agreement left open the appropriate remedy once a finding was made in favor of the claimant. In such cases the courts have consistently held that the arbitrator is free to fashion his own remedy. See *Peter Cooper Corp. v. United Elect., Radio, Etc.*, 472 F. Supp. 692 (E.D. Wisconsin 1979), p. 696:

> [8] Finally, the collective bargaining contains no provisions as to remedies thereby leaving the arbitrator free to exercise his discretion.

See also *Knox Porcelain Corp. v. Teamsters Local U. No. 519*, 504 F. Supp. 284 (E.D. Tennessee 1980) at p. 287 where the court stated:

> It is well settled that where the collective bargaining agreement is silent as to remedies, as is the agreement in this case, the arbitrator is given wide latitude in fashioning a remedy.

The case at bar should also be distinguished from those collective bargaining agreements which state that the ar-

bitrator *may* award monetary damages in cases of wrongful discharge. Clearly in collective bargaining agreements that use discretionary language in granting awards, the arbitrator is free to fashion an award as he sees fit. See *Resilient Floor, Etc. v. Welco Mfg., Inc.,* 542 F2d 1029 (8th Cir. 1976) at p. 1033 where the collective bargaining agreement was in part set out as follows:

> Although the relevant provision of the collective bargaining agreement states that the arbitrator *may* award monetary damages for back pay in case of wrongful discharge, it is silent with respect to the amount of back pay allowable. (emphasis supplied).

And *Local 1 of U. Food & Com'l Workers v. Heinrich Motors,* 559 F. Supp. 192 (W.D. New York 1983) at pp. 193-194 where the collective bargaining agreement in question stated:

> Section 3. The decision of the arbitrator shall be final and binding upon the parties. The arbitrator shall have no power to: (a) determine arbitrability; (b) add to, subtract from, modify or amend any provisions of this Agreement; (c) change existing wage rates; (d) award monetary damages except for back pay (*at the discretion of the arbitrator*) in case of wrongful discharge; (e) arbitrate proposals for the amendment or renewal of this Agreement. No award shall be effective retroactive beyond the date on which the grievance was first presented in writing pursuant to the grievance procedure as herein provided, nor for any period subsequent to the termination of this Agreement. (emphasis supplied).

In both the *Resilient Floor* and *Heinrich Motors* cases the respective courts were in agreement that the discretionary language in the collective bargaining agreements allowed

the arbitrator a wide latitude in fashioning a remedy. However, both courts indicated the arbitrator was not free to ignore expressly drawn provisions. It is obvious that the United States District Court in the case at bar felt that Public Law Board No. 3314 in Award No. 4 failed to draw its essence from the collective bargaining agreement when it refused to award Appellee back pay under Rule 45 (c). In his Memorandum filed September 30, 1985, the Honorable C. Arlen Beam stated: (See Appendix 24).

> The Court modified the Law Board's award by ordering back pay in accordance with Rule 45 of the Agreement between the Union Pacific and BRAC.

Petitioner submits that the Memorandum of Agreement taken together with Rule 45 (c) of the BRAC Agreement is such a contract as is referred to in the case of *Resilient Floor, Etc. v. Welco Mfg. Co., Inc.*, supra, which confines the arbitrator's powers to awards of full or no back pay exclusively. As the charges against Petitioner were not sustained by Public Law Board No. 3314 in Award No. 4, back pay for Petitioner was mandatory.

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REASONS FOR GRANTING THE WRIT

The key issue in the case at bar is the latitude to be allowed to an arbitrator in interpreting and fashioning an award based upon a particular collective bargaining agreement and such other agreements as may be before the arbitrator in a particular case.

All of the circuit courts have consistently held that the terms of each respective collective bargaining agreement before the arbitrator determines the latitude to be given an arbitrator in fashioning an award. If a collective bargaining agreement leaves the remdy open or uses permissive language then an arbitrator is free to fashion his own remedy, see *Peter Cooper Corp. v. United Elect., Radio, Etc.,* 472 F. Supp. 692 (E.D. Wisconsin 1979), p. 696; *Knox Porcelain Corp. v. Teamsters Local U. No. 519,* 504 F. Supp. 283 (E.D. Tennessee 1980) p. 287; *Resilient Floor, Etc. v. Welco Mfg. Co., Inc.,* 542 F2d 1029 (8th Cir. 1976) p. 1033 and *Local 1 of U. Food and Com'l Workers v. Heinrich Motors,* 559 F. Supp. 192 (W.D. New York 1983) pp. 193-194. However, if a collective bargaining agreement uses language limiting the authority of the arbitrator to fashion an award, then the arbitrator is limited to the award prescribed in the collective bargaining agreement, see *Int. U. of Operating Engineers v. Shank-Artukvich,* 751 F2d 364 (10th Cir. 1985) p. 366; *Local 1837, Intern. Broth. v. Maine Public Service Co.,* 579 F. Supp. 744 (D. Maine 1984); *Bro. of R.R. Signalman v. Louisville and N.R. Co.,* 688 F2d 535 (7th Cir. 1982).

What the majority decision of the Court of Appeals has done in the case at bar is to treat Petitioner's collective bargaining agreement as if it were worded permissively. If this were the case, the arbitrator would of course have broad authority in fashioning an award. As previously pointed out by Petitioner, however, her collective bargaining agreement used language expressly limiting the authority of the arbitrator to fashion an award. It was therefore improper for the arbitrator to ignore the express language of Rule 45 (c) mandating an award of back pay

when the charges against the Petitioner were not sustained. The majority decision of the Court of Appeals fails completely to recognize the distinction followed by the other appellate courts between permissive and limiting language in a collective bargaining agreement as determining the latitude an arbitrator has to fashion an award.

What the majority decision of the Court of Appeals has also done in the case at bar is to treat Petitioner's collective bargaining agreement as if it were worded identically to the one before the Court in the case of *Zaviar v. Local No. 2747, Airline Etc., Employees,* 733 F2d 556 (8th Cir. 1984). In the *Zaviar* case a finding of "full exoneration" by the arbitrator was required before back pay could be awarded. Such a requirement is not present in Petitioner's collective bargaining agreement which only requires that charges not be sustained by the arbitrator in order to mandate an award of back pay.

It should be noted that the majority decision of the Court of Appeals relied heavily on the *Zaviar* case, which was authored by the dissenting judge in the same three judge panel. Petitioner would urge the Court to review the dissenting opinion in her case before the Court of Appeals written by the Honorable John R. Gibbons. (See Appendix 7). Petitioner submits that the dissenting opinion written by the Honorable John R. Gibbons reflects the proper legal conclusions regarding the interpretation of Petitioner's collective bargaining agreement.

Petitioner submits that the majority decision of the Court of Appeals in the case at bar is in conflict with, among others, the following appellate court decisions.

Int. U. of Operating Engineers vs. Shank Artukvich, 751 F2d 364 (10th Cir. 1985).

Roy Stone Transfer v. Teamsters, Etc., Local Un. 22, 752 F2d 949 (4th Cir. 1985).

Buckeye Cellulose v. District 65, Div. 19, Etc., 689 F2d 629 (6th Cir. 1982).

Resilient Floor, Etc. v. Welco Mfg. Co., Inc., 542 F2d 1029 (8th Cir. 1976).

Bro. of R.R. Signalman v. Louisville and N.R. Co., 688 F2d 535 (7th Cir. 1982).

If the majority decision in the case at bar is allowed to stand, it will create a conflict in decisions in the several circuit courts of appeals as well as create chaos and confusion regarding the validity of the language negotiated in existing collective bargaining agreements. The case at bar is of exceptional importance to labor unions since the majority decision of the Court of Appeals apparently abrogates express provisions of a collective bargaining agreement and may have far reaching effects on labor disputes and future arbitration appeals.

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CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be issued from this Honorable Court to review the judgment of the United States Court of Appeals for the Eighth Circuit. In the event the Petition is granted, Petitioner prays that the judgment of the Court of Appeals be reversed and that the judgment of the United States District Court for the District of Nebraska be reinstated.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2337 NE Civil

LUANN K. WALSH,	)	
	)	
Appellee,	)	
	)	
v.	)	
	)	
UNION PACIFIC RAIROAD COMPANY,	)	
	)	
Appellant.	)	Appeal from the United States District Court for the District of Nebraska.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.	)	

Submitted: April 16, 1986

Decided: October 14, 1986

Before GIBSON and FAGG, Circuit Judges, and SWYGERT, Senior Circuit Judge.*

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* The Honorable Luther M. Swygert, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

SWYGERT, Senior Circuit Judge.

LuAnn Walsh was employed as a file clerk in the Union Pacific Railroad's engineering department. On June 10, 1977 she requested a thirty-day leave of absence. Leave was granted but she was told that she would have to be examined by a company doctor if she wished to have her leave extended. Walsh did not do this. Instead, at the end of the thirty-day leave of absence, Walsh delivered a not to the company by her personal physician, stating that she should have medical leave for an additional sixty days because of pregnancy. The company twice asked Walsh's personal physician to provide a detailed report supporting the request for the sixty-day leave extension. Walsh's doctor did not respond to the company's request and did not advise Walsh that the request had been made. On August 8, 1977 Walsh was fired. The purported basis of her dismissal was Rule 43(f) of the collective bargaining agreement negotiated between the railroad and the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"), Walsh's authorized representative. Rule 43(f) states that: "Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless a reasonable excuse for such failure is furnished not later than ten days after expiration of leave of absence."

On August 23, 1977 BRAC requested a post-termination hearing pursuant to Rule 43(g) of the collective bargaining agreement. Rule 43(g) provides that an employee "voluntarily leaving" or absent from duty without "proper leave of absence" (except in cases of illness) will be terminated, but conditions this termination upon the hold-

ing of a formal hearing. The request for a hearing was denied on August 24, 1977 on the basis of the railroad's belief that Rule 43(f) and not Rule 43(g) applied to Walsh's termination. Negotiations between BRAC and the railroad ensued but to no avail. On December 21, 1982 the railroad and the union agreed to establish a special adjustment board (Public Law Board No. 3314) as permitted by the Railway Labor Act. 45 U.S.C. § 153 Second.

Public Law Board No. 3314 heard arguments from both the railroad and the union, and on May 29, 1983 rendered Award No. 4 ordering Walsh's reinstatement but without backpay or benefits. The Board stated that:

> The Board concurs with the Carrier's view that the Claimant had the responsibility to furnish the reasons for the requested medical leave of absence; and when the Chief Engineer wrote Dr. Taylor on July 14, 1977 that the Carrier's Medical Director wanted a detailed report of the reasons for granting an extension, the Claimant should have taken steps to see her doctor honored this request. The Claimant cannot put herself on leave or extend her leave by inference or assumption. The Claimant had to take positive measure to secure an extension of her existing leave. However, the only flaw in the record is that the Chief Engineer did not inform the Claimant that her physician was not complying with the Medical Director's request. While the Board admits it is difficult for a patient to get a doctor to comply with a third party's request, nevertheless, the Carrier should have put her on notice that her physician was not honoring a valid request.

The union and the railroad adopted Award No. 4 and Walsh resumed her employment on July 18, 1983. Nevertheless, on November 29, 1983 she filed a complaint against

both the railroad and the union in the United States District Court for the District of Nebraska seeking recovery for wrongful discharge and breach of duty of fair representation and to have Award No. 4 set aside.

In a series of memorandum opinions and orders culminating in an appealable final order issued on September 30, 1985 the district court dismissed the wrongful discharge and fair representation claims, but set aside Award No. 4 and entered judgment in the amount of $130,253.63 against the railroad in backpay benefits. The district court held that the Board award failed to "draw its essence" from the collective bargaining agreement and was thus unenforceable. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

It is well-established that if an arbitrator's award does not draw its essence from the collective bargaining agreement, the reviewing court must vacate or modify the award. *International Brotherhood of Electrical Workers v. Sho-Me Power*, 715 F.2d 1322, 1325 (8th Cir. 1983). But in determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts resolved in favor of the arbitrator's award. *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-31 (8th Cir. 1983) (en banc). The test "is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of the contract." *Brotherhood of Railway, Airline & Steamship Clerks v. Kansas City Terminal Railway*, 587 F.2d 903, 906-07 (8th Cir. 1978), *cert. denied*, 441 U.S.

907 (1979) (quoting *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)).

The district court felt justified in setting aside the arbitrator's award because "the Board's decision does not follow logically from its findings of fact." Specifically, the district court noted that the Board itself was not convinced that the blame for the termination lay *solely* with Walsh. The Board acknowledged that the railroad should have informed Walsh of her physician's failure to respond to its inquiries. As we read the district court's decision, having found that Walsh did not bear *sole* blame, the Board was required by the terms of the bargaining agreement to find that she deserved a complete vindication. The court observed that: "Under the circumstances, the Court finds that the plaintiff complied with the terms of the collective bargaining agreement." The court further found that Walsh "was not culpable to any degree." These rulings by the district court flatly contradict the findings of the Board. We cannot approve of the district court's usurption of the authority vested by Congress in the Public Law Board.

In this case the Board was presented with a question requiring it to interpret, and possibly to choose between, two provisions of a collective bargaining agreement. As we read its decision the Board found that neither party had fully lived up to the spirit of the agreement. The award it issued was the Board's obviously well-considered attempt to balance the conduct of the parties in light of the terms of the existing labor contract. Matters of contract interpretation are committed to the arbitrator. *United Steelworkers of America v. American Mfg. Co.*,

363 U.S. 564, 567-68 (1980). Ambiguities in the opinion accompanying an award are normally not a reason for refusing to enforce an award. *Steelworkers v. Enterprise Wheel,* 363 U.S. at 597-98. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Id.* at 597. In this case the district court refused to permit the arbitrator to exercise that flexibility.

In *Zevair v. Local No. 2747, Airline, Aerospace & Allied Employees,* 733 F.2d 556 (8th Cir. 1984), this court affirmed a district court decision dismissing a petition for review of an arbitration award. In *Zevair,* as in this case, the employee had been dismissed for being absent without leave. In *Zevair,* as in this case, the arbitrator found that neither party was completely blameless. In *Zevair,* the arbitrator ordered the employee reinstated but with only half of lost wages because "she too was at fault." *Id.* at 558. In *Zevair,* as in this case, the employee claimed that partial exoneration required, under the terms of the collective bargaining agreement, reinstatement with full backpay. We rejected that argument stating that: "In the absence of full exoneration [the agreement] does not require an award of full back pay. Thus the Board had authority to exercise its discretion in formulating a remedy, and the award drew its essence from the collective bargaining agreement." That this case is controlled by *Zevair* could not be clearer. The district court's attempt to distinguish

the case is unpersuasive and relies on what seems to be a misreading of the Board's findings.

The decision of the district court is REVERSED and the award of Public Law Board No. 3314 is REINSTATED.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. The district court concluded that reinstatement of Walsh and denial of back pay "fails to draw its essence from the collective bargaining agreement." In my opinion, the district court did not err in so concluding.

The collective bargaining agreement, Rule 45(c), provides as follows:

> *If the final decision decrees that charges against against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and compensated for any loss of wages.*
>
> Where an employe is dismissed or suspended from service for cause and subsequently it is found that such discipline was unwarranted and the employe is restored to service with pay for time lost, earnings in other employment shall be used to offset the loss of earnings. (Emphasis added.)

In granting Award No. 4, Public Law Board No. 3314 concluded that "the record does not support the termination" of Walsh. This is an express finding that the charges against Walsh were not sustained. Rule 45(c) thus requires that the record be cleared of the charge and that Walsh be reinstated and compensated for any loss of wages; the Board has no discretion to deny compensation for loss of wages.

The Memorandum of Agreement signed by the parties authorizing the formation of Public Law Board No. 3314 provides as follows:

> The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules.

This limiting provision deprives the Board of authority to change existing agreements or write new rules. This, however, is precisely what the Board did in this case. The district court correctly determined that the Public Law Board had violated the express language of the collective bargaining agreement and the Memorandum of Agreement when it denied back pay after finding that the record (*did not*) support termination. The situation is similar to that in *International Union of Operating Engineers, Local 9 v. Shank-Artukovich,* 751 F.2d 364 (10th Cir. 1985), wherein the court stated:

> Article VII, § 5 of the collective bargaining agreement at issue here contains express language that required the employer to pay damages if it violates the manning provision of the agreement. The agreement is unequivocal:
>
> > If violations of the manning provisions . . . are found by . . . the Arbitrator and if an individual(s) is found entitled to back pay, the same shall be paid by the violator, but if no individual is found entitled to damages the violator shall remit such damages to the Trustees of the Colorado Journeymen and Apprentice Training Fund for Operating Engineers.

> The plain language of the agreement contemplates damages whenever the employer violates the manning provisions of the agreement. If no individual is entitled to damages, the agreement requires the employer to pay damages to the union training fund.
>
> The arbitrator found that the employer had violated the manning provisions of the agreement. He also concluded that no individual was entitled to backpay. However, he ruled that the employer was not required to pay damages to the union training fund. His decision did not draw its essence from the collective bargaining agreement. It was contrary to the express terms of the agreement.

Id. at 366.

Zevair v. Local No. 2747, 733 F.2d 556 (8th Cir. 1984), does not require a different result *Zevair* dealt specifically with the collective bargaining agreement's use of the word "exonerated." In *Zevair,* the collective bargaining agreement provided that if an employee is "exonerated," she should be reinstated and paid for lost time. We concluded that the chairman did not consider *Zevair* to be fully exonerated in the sense of bearing no responsibility for her discharge. Accordingly, the Board was free to exercise its discretion in formulating a remedy. The collective bargaining agreement in this case is substantially different, referring only to the situation where the charges "were not sustained"; exoneration is not an issue. The Board's conclusion that the record did not "support the termination" comes squarely within the language of Rule 45(c) and thus, unlike the situation in *Zevair,* leaves no room for the exercise of discretion.

As the award was directly contrary to the express terms of the agreement, the district court did not err in

its determination that the Public Law Board's award did not draw its essence from the contract. I would affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LUANN K. WALSH,	)	
	)	
Plaintiff,	)	CV 83-0-806
	)	
vs.	)	ORDER
	)	(Filed Jan. 25, 1985)
UNION PACIFIC RAILROAD COMPANY, et al.,	)	
	)	
	)	
Defendants.	)	

This matter is before the Court upon the Brotherhood of Railway, Airline and Steamship Clerks & Freight Handlers, Express and Station Employees (the Union) and BRAC System Board No. 106's (the Board) motion for summary judgment on its cross-claim against defendant Union Pacific Railroad (the Carrier) (filing 29); plaintiff's motion for summary judgment against the Carrier on its second cause of action (filing 31); defendant-carrier's motion for summary judgment on the Union's cross-claim (filing 33); and defendant-carrier's motion for summary judgment on the plaintiffs' complaint (filing 34).

In this case the Court is required to review a June 30, 1983, decision of Public Law Board Number 3314. Jurisdiction is predicated upon 28 U.S.C. § 1337 and the Railway Labor Act, 45 U.S.C. § 153 First (q).

On June 10, 1977, the plaintiff's request for a thirty-day leave of absence on account of illness was granted.

On July 8, 1977, one Dr. Taylor wrote to the Carrier stating that the plaintiff was under his care and that she would not be able to return to work for another 60 days. On July 14 and August 1 of 1977, the Carrier wrote to Dr. Taylor, requesting that he furnish a detailed medical report to substantiate the request for extended leave. Dr. Taylor did not reply to either letter, and the plaintiff was not notified of the correspondence.

The Carrier fired the plaintiff on August 8, 1977, for failing to return from her 30-day sick leave. Six years expired before the matter came before Public Law Board Number 3314. In award number 4 the plaintiff was reinstated but was not awarded back pay.

In her first cause of action the plaintiff is suing the Carrier for wrongful discharge.[1] The second cause of action is brought under the Railway Labor Relations Act, 45 U.S.C. § 153 Second, for judicial review of the Public Law Board's arbitration award. The plaintiff alleges that the Board, in making its award, failed to confine itself to matters within the scope of its jurisdiction, and argues that the denial of back pay and other benefits was without foundation in reason or in fact.

In its cross-claim the Union also challenges the Public Law Board's award. The Union argues that the Board's finding that the Carrier was wrongful in failing to notify the plaintiff of the request for additional medical

information from her doctor compels an award of back pay.

The collective bargaining agreement in effect between the parties provides in part:

> Failure to report for duty at the expiration of leave of absence shall terminate an employe's [sic] service and seniority, unless a reasonable excuse for such failure is furnished not later than ten (10) days after expiration of leave of absence.

Rule 43(f). The Carrier contends that it had just cause to fire the plaintiff under the provision of the collective bargaining agreement.

Congress has established an exclusive compulsory arbitration system for the processing of railroad employees' grievances. *Andrews v. Louisville & N.R.Co.,* 406 U.S. 320, 325 (1972); *see* section 3 First of the Railway Labor Act, 45 U.S.C. § 153 First (i). Only three situations exist where an employee may bring a wrongful discharge action in federal court against the employer railroad: (1) where the railroad repudiates the contractual grievance procedures, *Vaca v. Sipes,* 386 U.S. 171, 185 (1967); (2) where the employer's union has the sole power to process the grievance, *id.;* and (3) where the employee's complaint clearly alleges that proceeding with administrative or contractual remedies would be totally futile because of active concert or conspiracy between the union and the railroad intended to deprive the employee of her rights under the collective bargaining agreement. *Glover v. St. Louis-San Francisco Ry. Co.,* 393 U.S. 324, 330-331 (1969) (racial discrimination alleged).

The Court finds that the Carrier has abided by the provisions of the collective bargaining agreement; and

that the employee was not wholly dependent on the Union to process her grievance; *see* 45 U.S.C. § 153 (i); *Union Pac. R. Co. v. Sheehan*, 439 U.S. 89, 95 (employee initiated action before the National Railroad Adjustment Board). Nonetheless the Court is unable to enter summary judgment for defendant-carrier on the plaintiff's wrongful discharge claim because of factual disputes regarding whether collusion or conspiracy occurred between the Union and the Carrier. *See Westborough Mall v. Cape Giradeau*, 693 F.2d 733, 743 (8th Cir. 1982) (elements of conspiracy rarely established on motion for summary judgment).

The Court's refusal to dismiss the plaintiff's first claim for relief against the Carrier does not prohibit the Court from addressing her second claim, wherein she asks for judicial review of the Public Law Board's decision.

The Public Law Board's findings of fact are conclusive on all parties pursuant to the provisions of 45 U.S.C. § 153 First (q), 153 Second. It has been said that the range of judicial review in cases like this one "is among the narrowest known to the law." *Denver & Rio Grande Western R. Co. v. Blackett*, 538 F.2d 291, 293 (10th Cir. 1976). Courts have shown great deference to arbitrator's awards.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

United Steel Workers v. Enterprise Wheel & Car Corp., 393 U.S. 593, 597 (1960); *see also Lynchburg Foundry*

Co., Division of Woodward Iron Co. v. United Steel Workers of America, Local 2556, 404 F.2d 259, 261 (4th Cir. 1968); *Epple v. Union Pacific Railroad Co.-Eastern Division,* 558 F. Supp. 63, 64-65 (D. Colo. 1983).

The path of judicial review is narrow but not impassable. Under 42 U.S.C. § 153 First (q) a court may reverse or revise a Public Law Board order if the Board (1) fails to comply with the Railway Labor Act; (2) fails to confirm or confine itself to matters within the scope of its jurisdiction; or (3) practices fraud or corruption. *Sheehan,* 439 U.S. at 94; *Cannon v. Consolidated Freightways Corp.,* 524 F.2d 290, 295 (7th Cir. 1975). Further, an arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. *Airline Pilots Ass'n, Intern. v. Eastern Airlines, Inc.,* 632 F.2d 1321, 1324 (5th Cir. 1980); *Lever Bro. Co. v. Oil, Chem. & Atomic Workers Int.,* 555 F. Supp. 295, 297 (N.D. Ind. 1983).

Leaving undisturbed the Board's findings of fact, the Court finds that plaintiff deserves back pay. The Board's decision does not follow logically from its findings of fact. At one point the Board appears to intimate that the plaintiff violated Rule 43 of the collective bargaining agreement.

> The Board concurs with the Carrier's view that the claimant had the responsibility to furnish the reasons for the requested medical leave of absence; and when the chief engineer wrote Dr. Taylor on July 14, 1977, that the Carrier's medical director wanted a detailed report of the reasons for granting an extension, the claimant should have taken steps to see her doctor honor this request.

Yet in another place, the Board candidly acknowledges that it would have been impossible for the plaintiff to have compelled her doctor to answer the Carrier's letters because she was not aware that the letters had been sent.

> While the Board admits it is difficult for a patient to get a doctor to comply with a third-party's request, nevertheless, the Carrier should have put her on notice that her physician was not honoring a valid request. The record shows that the Chief Engineer sent a copy of his July 14, 1977, request to the Carrier's medical director. He should have also sent a copy of this letter to the claimant. She was a vital party in interest.

In sum, the Court finds that the Board erred in requiring the plaintiff to telepathically monitor her doctor's private correspondence. The Court finds the present facts easily distinguishable from the two cases cited by the Carrier where the employee's misconduct was clearly established. *Lynchburg,* 404 F.2d at 259 (employee falsified business records); *Epple,* 558 F. Supp. at 63 (employee vandalized company property).

As the Board itself acknowledges, the Carrier, if dissatisfied with the employee's excuse for not returning from sick leave, had a duty to notify her of their letters to her doctor.

Under the circumstances, the Court finds that the plaintiff complied with the terms of the collective bargaining agreement. She provided a reasonable excuse to the Carrier for her failure to report for duty upon the expiration of her 30 day sick leave by having her doctor send the letter of July 8, 1977. Therefore, the Board's decision to deny plaintiff back pay and other benefits fails to draw its essence from the collective bargaining

agreement. *Airline Pilots Ass'n,* 632 F.2d at 1324. Accordingly, the Court finds that the Carrier should pay the plaintiff back pay from February 21, 1978,[2] to the date of reinstatement.

Accordingly,

IT IS HEREBY ORDERED that BRAC and BRAC System Board Number 106's motion for summary judgment on its cross-claim against defendant Union Pacific Railroad (filing 29) is granted in part; plaintiff's motion for summary judgment against the Carrier on her second cause of action (filing 31) is also granted in part.

IT IS FURTHER ORDERED that the defendant Carrier's motion for summary judgment on the Union's cross-claim (filing 33) and defendant Carrier's motion for summary judgment on the plaintiff's complaint (filing 34) are denied.

IT IS FURTHER ORDERED that evidence on back pay and other benefits will be received upon the trial of this action, after which trial a final order on liability and damages under the second cause of action shall be entered.

DATED this 25th day of January, 1985.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

FOOTNOTES

[1]The plaintiff is also suing the Union for breach of its duty of fair representation in her first cause of action. The plaintiff's claim against the Union is not presently before the Court.

[2]All parties agree that plaintiff was not physically fit to return to work until February 21, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LUANN K. WALSH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV 83-0-806
	)	
UNION PACIFIC RAILROAD COMPANY, et al.,	)	MEMORANDUM
	)	
Defendants.	)	

(Filed September 30, 1985)

APPERANCES:

For plaintiff—
Mr. Bruce Abrahamson
Omaha, Nebraska

For defendant Union Pacific Railroad—
Ms. Brenda Warren
Omaha, Nebraska

For defendant BRAC—
Mr. Robert O'Connor, Jr.
Omaha, Nebraska

BEAM, District Judge.

This matter is before the Court for decision after trial to the Court and submission of written closing arguments by the plaintiff and defendant Union Pacific Railroad Company (Union Pacific).[1]

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[1] Defendants Brotherhood of Railway, Airline and Steamship Clerks & Freight Handlers, Express and Station Employees and

(Continued on following page)

The plaintiff was a file clerk in the Engineering Department of Union Pacific. On June 10, 1977, plaintiff applied for a thirty day leave of absence, which was approved for the period from June 13, 1977, to July 12, 1977. Plaintiff's doctor notified the Union Pacific on July 8th that he had advised the plaintiff to extend her medical leave for sixty days. The Union Pacific then requested the doctor to furnish a detailed report to support his recommendation. The plaintiff was not notified of the request that Union Pacific had made of the plaintiff's doctor. The plaintiff did not return to work and was not notified that her doctor had failed to respond to the query. Union Pacific's chief engineer notified the plaintiff by letter dated August 8, 1977, that she had been fired and that her seniority rights had been terminated.

Plaintiff's grievance was processed through every step of the procedure by her Union, BRAC Steamliner Lodge No. 335 (Local 335) and BRAC. After all attempts to settle the dispute with Union Pacific had failed, an agreement was reached between BRAC and Union Pacific on December 21, 1982, to establish Public Law Board No. 3314 for the purpose of hearing the plaintiff's unresolved claim. The Public Law Board No. 3314 awarded the plaintiff reinstatement with seniority but without back pay (Award No. 4).

(Continued from previous page)

Brotherhood of Railway, Airline and Steamship Clerks & Freight Handlers, Express and Station Employees, Union Pacific-Lines East System Board of Adjustment No. 106 (together hereinafter referred to as BRAC) did not submit a written closing argument in support of their position.

Plaintiff initiated this action, seeking recovery for wrongful discharge and an order setting aside Award No. 4 and awarding plaintiff back pay.

Plaintiff in her first cause of action alleged: (1) that BRAC and Local 335[2] breached their statutory duty of fair representation in handling the plaintiff's grievance; and (2) there was collusion between Union Pacific, BRAC, and Local 335 to deny plaintiff her rights under the collective bargaining agreement.

Plaintiff in her second cause of action alleged that Public Law Board No. 3314 exceeded the scope of its jurisdiction when it awarded reinstatement and seniority but no back pay.

On January 25, 1985, this Court granted partial summary judgment to the plaintiff and BRAC (filing 52). The Court held that the award of the Public Law Board had exceeded its jurisdiction. The Court stated that the award "failed to draw its essence" from the bargaining agreement. The Court ordered back pay with the amount to be determined at trial. The parties then stipulated (Exhibit 45) to the amount of back wages and benefits the plaintiff would have been entitled to had she not been fired. As a result of filing 52 and the stipulation, the only issues which were tried to the Court were: (1) whether there was sufficient evidence to establish collusion on the part of Union Pacific to entitle plaintiff to relief on her first cause of action; and (2) whether the Union Pacific is entitled to offset against the award for back pay.

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[2] Local 335 was dismissed from this action by order dated April 16, 1984 (filing 23).

I. Wrongful Discharge

A claim of wrongful discharge against a railroad employer is governed by the Railway Labor Act, 45 U.S.C. §§ 151, et seq. (RLA). Under the RLA the resolution of grievances arising from allegations of wrongful discharge generally lies within the exclusive jurisdiction of the arbitration system created by the Act. 45 U.S.C. § 153 First (i). A federal district court would, therefore, in the normal course, not have jurisdiction over a discharge claim against a railroad company for breach of the collective bargaining agreement. The federal court does, however, have jurisdiction over claims brought by employees against unions for breach of the statutory duty of fair representation.[3] 28 U.S.C. § 1337; *Hunt v. Missouri Pacific Railroad*, 729 F.2d 578, 580 (8th Cir. 1984); *Raus v. Brotherhood of Railway Carmen*, 663 F.2d 791, 796 (8th Cir. 1981).

When, however, it appears from the pleadings that the employee's suit is a claim against the union and the railroad, who together have denied the employee his or her rights, then a court may assert jurisdiction over both the claim against the union for breach of duty of fair representation and over the railroad on the wrongful discharge or contract claim. *Raus*, 663 F.2d at 798. However, the employee claiming against the railroad is required to allege with supporting facts collusive conduct between the railroad and union or in some other way tie the railroad to arbitrary, discriminatory or bad faith con-

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[3] Collusive acts between a union and railroad is a form of bad faith that constitutes unfair representation. Brown v. Transworld Airlines, Inc., 746 F.2d 1354, 1357 (8th Cir. 1984).

duct of the union amounting to breach of duty of fair representation. *Hunt,* 729 F.2d at 580; *Price v. Southern Pacific Transportation Co.,* 586 F.2d 750, 752 (9th Cir. 1978). In other words, the Court must find collusion did in fact exist before an employee will be allowed to prevail on a breach of contract claim against the railroad. *Brown,* 746 F.2d at 1357.

Collusion is a form of unfair representation, as noted *supra,* footnote 3, and as a matter of law, a finding of unfair representation requires more than negligent activity on the part of the union and the railroad. *Brown,* 746 F.2d at 1358. The plaintiff must show that the handling of his grievance was discriminatory, perfunctory or in bad faith. *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 203 (1944); *Vaca v. Sipes,* 386 U.S. 171 (1967).

The plaintiff in the present case has alleged both breach of the duty of fair repersentation by the union and collusion between the Union Pacific and BRAC but has failed to establish facts to support either allegation. While collusion is a form of unfair representation different sets of facts may be required to prove each claim. *Brown,* 746 F.2d at 1357.

With regard to the breach of fair representation issue the gist of the plaintiff's argument is that the union did not expeditiously handle the plaintiff's claim. While there was a span of approximately six years from the time of plaintiff's termination to the time Public Law Board No. 3314 convened, Mr. Willey and Mr. Kenny[4] testified

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[4] Mr. D. D. Willey was BRAC Systems Board's General Chairman at the time plaintiff was fired and Mr. Jerome H. Kenny is now retired but served as Director of Labor Relations for Union Pacific at the time of this dispute.

that contract negotiations, personnel problems and lack of funds all contributed to the delay. In addition, Mr. Willey testified that although he did not delay the plaintiff's case because of another factually similar case that was pending before the National Railroad Adjustment Board, he did hope for, and in fact did obtain a favorable ruling that he believed bolstered his position in the plaintiff's case.

After a review of the testimony, other evidence and arguments, the Court finds that passage of time is not sufficient to establish breach of duty of fair representation. The court finds that the plaintiff did not come forward with facts to show BRAC handled the plaintiff's claim in a perfunctory, arbitrary, discriminatory or even negligent manner.

With respect to the collusion allegation, the Union Pacific submitted the testimony of Mr. Jerome H. Kenney, Union Pacific's former Director of Labor Relations who denied any knowledge of or involvement by the Union Pacific in any activity designed to delay or frustrate the plaintiff's claim. The plaintiff failed to come forward with any evidence at all on this issue.

In consideration of the foregoing the Court specifically overrules the motions for dismissal made by BRAC and Union Pacific during the trial, and finds that based on the merits that BRAC neither breached its duty of fair representation, nor colluded with the Union Pacific in violation of the plaintiff's rights. Absent a finding of collusion this Court holds that it has no jurisdiction over the Union Pacific on the plaintiff's claim of wrongful discharge.

II. Award

This Court by its order dated January 25, 1985 (filing 52) exercised its limited authority to review Public Law Board 3314 Award No. 4 which granted reinstatement and seniority to the plaintiff. 45 U.S.C. § 153 First (q). The Court modified the Law Board's award by ordering back pay in accordance with Rule 45 of the Agreement between the Union Pacific and BRAC. Rule 45 of the agreement provides in pertinent part:

> If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and compensated for any loss of wages.
>
> Where an employe is dismissed or suspended from service for cause and subsequently it is found that such discipline was unwarranted and the employe is restored to service with pay for time lost earnings in other employment shall be used to offset the loss of earnings.

Modification of a Board's award is permitted once a court determines that the Board acted without jurisdiction. *Denver & Rio Grande Western R. Co. v. Blackett,* 538 F.2d 291, 292 (1976). The Union Pacific argued at trial and in its brief that this Court had no jurisdiction to modify the Board's award and alternatively, that if it did have such authority that the Union Pacific is entitled to reduce the award by the amount of the plaintiff's earnings from the time of discharge until the time of reinstatement. This Court disagrees.

First, if Union Pacific claim is characterized as a setoff, it is a defense that should have been pled affirma-

tively in accordance with *Fed. R. Civ. P.* 8(c).[5] *Chicago Great Western Ry. Co. v. Peeler,* 140 F.2d 865 (1944) (right to setoff pension was not permitted by defendant where not asserted in answer).

Second, if the reduction of damages is characterized as mitigation and is thereby permitted to circumvent the pleading requirements which apply to an affirmative defense, the defendant is still unable to reduce the award in accordance with the provisions of Rule 45.

Paragraph two of Rule 45, *supra,* permits an offset for "earnings in other employment." Plaintiff testified that she received income from a family owned Dairy Queen business after her dismissal from Union Pacific. Plaintiff testified that she did receive salary checks from the Dairy Queen but the money was not payment for services rendered. The plaintiff testified the payments were "for income tax purposes;" and further she stated that she would have received these checks even if she had continued to work at Union Pacific. The Court, therefore, concludes that the monies the plaintiff received from the Dairy Queen were not "earnings from other employment" and cannot be used to either mitigate or offset the plaintiff's award.

Finally, the Union Pacific has waited too long to raise its claim. The Union Pacific did not raise the notion of reduced damages until the trial. It was not raised as part of the proceedings before the Public Law Board; it was not mentioned in the Union Pacific's motion and support-

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[5] *Fed. R. Civ. P.* states, "A party shall set forth . . . any other matter constituting an affirmative defense."

ing brief for summary judgment; nor was it raised in the motion and brief for reconsideration after this Court awarded back pay in its order of January 25, 1985. *See Brotherhood v. St. Louis Southwestern Ry.*, 676 F.2d 132, 139 (5th Cir. 1982).

The Union Pacific is not entitled to an offset or mitigation of the damages that the parties agreed would have been owed to the plaintiff had she not been fired.

An order shall be entered contemporaneously this date in conformance with this Memorandum.

DATED this 30th day of September, 1985.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 83-0-806

LUANN K. WALSH,)
Plaintiff,)
vs.)

UNION PACIFIC RAILROAD)
COMPANY, et al.,)
Defendants.)

ORDER

(Filed September 30, 1985)

In accordance with the Memorandum filed this date,

IT IS ORDERED as follows:

1. Plaintiff's first cause of action should be and hereby is dismissed for lack of jurisdiction.

2. Judgment should be and hereby is entered against the defendant Union Pacific Railroad and in favor of the plaintiff in the amount of $130,253.63 on the plaintiff's second cause of action.

DATED this 30th day of September, 1985.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

(Filed October 14, 1986)

No. 85-2337NE LuAnn K. Walsh, Appellee, v. Union Pacific Railroad Company, Appellant. Brotherhood of Railway, etc.	*	Appeal from the United States District Court for the District of Nebraska. CV 83-0-806

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the decision of the district court is reversed and the award of Public Law Board No. 3314 is reinstated in accordance with the opinion of this Court.

October 14, 1986

Costs recoverable by appellant from appellee in accordance with the Court's directions: $356.80

A true copy:

ATTEST:

/s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS,
8TH CIRCUIT.

MANDATE ISSUED 2/13/87

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2337-NE LuAnn K. Walsh, Appellee, vs. Union Pacific Railroad Company, Appellant.	Appeal from the United States District Court for the District of Nebraska.

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Donald R. Ross, Theodore McMillian and John K. Gibson would have granted the petition.

Petition for rehearing by the panel is also denied.

January 23, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

MEMORANDUM OF AGREEMENT BETWEEN THE UNION PACIFIC RAILROAD COMPANY AND THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

* * *

It is mutually agreed between the parties hereto that—

(1) Effective there is hereby established pursuant to Section 3, Second of the Railway Labor Act, as amended by Public Law 89-456, a Special Board of Adjustment (hereinafter referred to as the "Board"). This Board shall have jurisdiction over claims and grievances shown on the attached list (Attachment "A"), submitted to it under this agreement, arising out of the interpretation or application of agreements governing wages, rules or working conditions.

(2) The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules, and working conditions, and shall not have the right to write new rules.

(3) The Board shall consist of three members: one member to be selected by the Carrier and one member to be selected by the Organization. The third member, who shall be Chairman of the Board, shall be selected by the two members representing the Carrier and Organization, or as provided in paragraph (4) hereof.

(4) The Carrier and the Organization shall appoint their respective members within ten days of the date of this Agreement and the two members shall confer within thirty days thereafter for the purpose of selecting the third member. If the two members selected by the parties fail to agree upon a third member within fifteen days from the date of their first conferring, notice of such failure shall be certified by both members jointly or by either member separately to the National Mediation Board with a request that the National Mediation Board name a neutral person as the third member of this Special Board of Adjustment.

(5) The compensation and expenses of the Carrier member shall be borne by the Carrier. The compensation and expenses of the Employe member shall be borne by the Organization. The compensation of the third or Neutral member shall be set and paid by the National Mediation Board. All other expenses of the Board shall be borne half by the Carrier and half by the Organization.

(6) The Board shall establish the rules of procedure for itself, except as otherwise provided herein. Thereafter, the Board shall meet at regularly stated times and continue in session until all matters submitted to it under this Agreement are disposed of. The Board shall have the authority to employ secretarial and other assistants and incur such other expenses as it deems necessary for the proper conduct of its business.

(7) The Board shall meet at Omaha, Nebraska or at such other location as may be selected by the Members of the Board. The Board shall begin hearings as soon as the Chairman is available.

(8) The Board shall hold hearings on each claim or grievance submitted to it. Due notice of such hearings shall be given the parties. At such hearings, the parties may be heard in person, by counsel, or by other representatives, as they may elect. The parties may present, either orally or in writing statements of fact, supporting evidence and data, and argument of their position with respect to each case being considered by the Board. The Board shall have authority to require the production of such additional evidence, either oral or written, as it may desire from either party.

(9) The determination that a third or additional party may have an interest in a dispute shall be made by the Neutral Member. Should the determination be made by the Neutral Member that a third or additional party may have a possible interest in a dispute, the Board shall give due notice of such possible interest to such other party or parties and an opportunity to be heard.

(10) In the event it is determined by the Neutral Member that a third or additional party has a possible interest in a particular dispute and due notice thereof is given as provided in this Agreement, such party or parties shall be given a reasonable period of time to present its or their position to the Board and shall be accorded the same full and fair hearing procedures as are provided herein for the original parties, including the right to appear with the same rights as the original parties, at any executive session of the Board convened for the purpose of considering and adopting any proposed award. In a dispute where such notice or hearing has been given to third or additional parties and such parties have partici-

pated in the hearing, the Award shall be made only by the Neutral Member.

(11) The Board shall make findings of fact and render an award within thirty (30) days after the close of hearing of each claim, with the exception of cases that may be withdrawn. No case may be withdrawn after hearing thereon has begun except by mutual consent of the parties. Findings and award shall be in writing and copy shall be furnished the respective parties to the dispute. The rendition of such awards shall be in accordance with the provisions of Section 3, First and Second of the Railway Labor Act; they shall be final and binding upon all parties to the dispute; and shall have the same force and effect as awards of the National Railroad Adjustment Board. If in favor of the petitioner, such award or awards shall direct the other party to comply therewith on or before a day named.

(12) Each member of the Board shall have one vote and a majority of the Board shall be competent to render an award or make such other rulings and decisions as may be necessary to carry out the functions of the Board. In case a dispute arises involving the interpretation of an award, the Board, upon request of either party, will reconvene and interpret the award in the light of the dispute.

(13) The Board hereby established shall continue in existence until it has disposed of all claims and grievances submitted to it under this Agreement, after which it will cease to exist except for interpretation of its awards as provided in paragraph (12) next above.

(14) The Organization and/or the Carrier may from time to time make a substitution or change in its repre-

sentative on the Board. Whenever during the proceedings of the Board one of the partisan members becomes incapacitated by reason of illness or otherwise, the Organization or the Carrier, as the case may be, may appoint a substitute. It is further understood that upon recovery and availability of the member for whom substitution was made, he may be returned to the position held by him on the Board, and if it be necessary to make a substitution in Executive Session from time to time in order to have present in the Executive Session, for the purposes of the Executive Session, a member who sat at the time the testimony was taken in the case, this may be done.

(15) The time limits provided in this Agreement may be extended by mutual agreement.

Signed at Omaha, Nebraska this 21st day of December 1982.

For: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

For: Union Pacific Railroad Company

/s/ R. I. Kilroy
International President

/s/ R. D. Meredith
Director, Labor Relations

No. 86-1723

In The
Supreme Court of the United States
October Term, 1986

LUANN K. WALSH,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS EXPRESS AND STATION EMPLOYEES: BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRENDA J. COUNCIL
General Attorney
Union Pacific Railroad Company
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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit correctly found that an arbitrator had properly interpreted the terms of a particular collective bargaining agreement.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

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* An updated version of the statement required by Supreme Court Rule 28.1 is included in the attached Appendix.

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STATUTES

No. 86-1723

In The
Supreme Court of the United States
October Term, 1986

LUANN K. WALSH,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS EXPRESS AND STATION EMPLOYEES: BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Union Pacific Railroad Company submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves the interpretation of a particular collective bargaining agreement. Petitioner, who was employed by Respondent as a file clerk, challenges the interpretation reached by an arbitrator jointly selected by the parties, which interpretation was ultimately sustained by the Court of Appeals for the Eighth Circuit.

On June 10, 1977, Petitioner requested a thirty (30) day leave of absence, which was granted on the condition that she submit to an examination by Respondent's physician if she wanted the leave extended beyond the initial thirty (30) day period. Petitioner did not return to work at the end of her thirty (30) day leave of absence, nor did she submit to an examination by Respondent's physician. Instead, Petitioner had a note delivered to Respondent by her personal physician stating that she should be granted medical leave for an additional sixty (60) days due to pregnancy. After two unsuccessful attempts by Respondent to obtain a detailed report from Petitioner's personal physician to support the request for a sixty (60) day extension of her leave, Petitioner's seniority and service were terminated for failure to return to work upon expiration of her leave of absence in violation of Rule 43 of the agreement governing Petitioner's terms and conditions of employment (hereinafter the "BRAC Agreement").

On April 19, 1978, a grievance was filed on Petitioner's behalf seeking reinstatement with back pay. Respondent denied the grievance, and Petitioner progressed appeals from that denial through the proper channels, as outlined in Section 3 First (i) of the Railway Labor Act,

45 U.S.C. § 153 First (i). Finally, it was agreed that Petitioner's grievance would be submitted to a Special Adjustment Board (Public Law Board) as permitted under Section 3 Second of the Railway Labor Act, 45 U.S.C. § 153 Second. On May 29, 1983, Public Law Board No. 3314 rendered Award No. 4 ordering reinstatement of Petitioner, seniority unimpaired, but without back pay or benefits. The Board found that neither Petitioner's nor Respondent's conduct was without fault. In its decision, the Board stated that:

> "The Board concurs with the Carrier's view that the Claimant had the responsibility to furnish the reasons for the requested medical leave of absence; and when the Chief Engineer wrote Dr. Taylor on July 14, 1977 that the Carrier's Medical Director wanted a detailed report of the reasons for granting an extension, the Claimant should have taken steps to see her doctor honored this request. The Claimant cannot put herself on leave or extend her leave by inference or assumption. The Claimant had to take positive measure to secure an extension of her existing leave. However, the only flaw in the record is that the Chief Engineer did not inform the Claimant that her physician was not complying with the Medical Director's request. While the Board admits it is difficult for a patient to get a doctor to comply with a third party's request, nevertheless, the Carrier should have put her on notice that her physician was not honoring a valid request." (Pet. App. 3).

The authorized representatives of Petitioner and Respondent adopted Award No. 4, and on July 18, 1983, Petitioner resumed her employment with Respondent.

On November 29, 1983, Petitioner filed a Complaint in the United States District Court for the District of Ne-

braska seeking recovery on two causes of action. In her second cause of action, Petitioner sought to have Award No. 4 of Public Law Board No. 3314 set aside and to obtain back pay. Respondent filed a Motion for Summary Judgment on Petitioner's second cause of action. Respondent sought summary judgment on the grounds that Award No. 4 was not subject to judicial review and that Award No. 4 drew its essence from the terms of the BRAC Agreement.

By Order dated January 25, 1985, the District Court denied Respondent's Motion for Summary Judgment and granted Petitioner summary judgment on the second cause of action to set aside Award No. 4. After dismissing Public Law Board No. 3314's findings of fact, the District Court went on to hold that:

> "... the Board erred in requiring the plaintiff to telepathically monitor her doctor's private correspondence." (Pet. App. 16).

On the basis of that holding, the District Court found that "the Board's decision does not follow logically from its findings of fact," and was thus unenforceable. Respondent's Motion to Reconsider said Order was denied by Order dated March 20, 1985. The District Court subsequently entered an Order awarding Petitioner the sum of $130,253.63 as back pay.

Respondent took an appeal from the District Court's Orders to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals held that the District Court had exceeded the scope of judicial review permitted under the Railway Labor Act in setting aside Award No. 4 of Public Law Board No. 3314, and stated:

> "The test 'is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of the contract.' *Brotherhood of Railway, Airline & Steamship Clerks v. Kansas City Terminal Railway,* 587 F.2d 903, 906-07 (8th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979) (quoting *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970))."

The majority went on to say that it could not "approve of the District Court's usurption of the authority vested by Congress in the Public Law Board." (Pet. App. 5).

The Court also held that Award No. 4 drew its essence from the particular collective bargaining agreement at issue. The Court therefore reversed the District Court and reinstated Award No. 4 of Public Law Board No. 3314.

ARGUMENT

I.

The Petition Satisfies None Of The Traditional Standards Governing Review On Certiorari.

A. According to Petitioner, the "key issue" raised by the petition is the scope of an arbitrator's discretion under a "particular collective bargaining agreement." (Pet. 11). That issue has no jurisprudential significance. As Petitioner recognizes, the Federal courts "have consistently held that the terms of each respective collective bargaining agreement . . . determine the latitude to be given

an arbitrator in fashioning an award'' under that agreement. (Pet. 12).

This Court has traditionally declined to resolve such issues of private contract interpretation. The reason, of course, is that such cases rarely, if ever, raise issues of broad applicability or public importance. This case is no exception. Petitioner does not seek to resolve a recurring problem or an issue that has affected anyone other than herself and her employer. Nor does she seek to correct a departure from established legal principles. Instead, Petitioner merely asks this Court to substitute its interpretation of a ''particular collective bargaining agreement'' for the interpretation of that agreement reached by both the Court of Appeals and the arbitrator jointly selected by the parties. A question of such limited jurisprudential importance does not warrant this Court's review.

B. The decision below is consistent with the decisions of every other Federal Court of Appeals that has addressed the issue of whether an arbitrator was free to exercise discretion in fashioning a remedy.[1] Petitioner is

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[1] The extent of an arbitrator's authority has been addressed by numerous Courts of Appeals. See e.g., *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982), *cert. denied* 459 U.S. 828, 103 S.Ct. 63 (1983); *Local 1020 of the United Brotherhood of Carpenters and Joiners of America v. FMC Corporation*, 658 F.2d 1285 (9th Cir. 1981); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Etc.*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied* 451 U.S. 937, 101 S.Ct. 2016 (1980); *Airline Pilots Ass'n, Intern. v. Eastern Airlines, Inc.*, 632 F.2d 1321 (5th Cir. 1980); *Campo Machining Co. v. Local Lodge No. 1926, Etc.*, 536 F.2d 330 (10th Cir. 1976); *Timken Company v. United Steelworkers of America*, 492 F.2d 1178 (6th Cir. 1974); and *Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259 (4th Cir. 1968).

flatly wrong in asserting that the decision below conflicts with recent decisions of other Courts of Appeals.[2] The cases cited by Petitioner in support of her assertion stand for the proposition that an arbitrator exceeds his authority in fashioning a remedy only if the collective bargaining agreement expressly forbids the arbitrator from exercising any discretion. The decision below is fully consistent with those cases because Public Law Board No. 3314 neither ignored any express provisions of the BRAC Agreement mandating a specific remedy or ignored any express provisions limiting its authority to fashion Award No. 4. Therefore, the conflict Petitioner alleges is illusory.[3]

II.

The Case Below Was Correctly Decided.

A Public Law Board's authority to formulate an appropriate remedy in cases such as the instant case has long been recognized by courts at every level of the Federal court system. This Court discussed the ability of an arbitrator to formulate an appropriate remedy in its de-

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[2] *International Union of Operating Engineers v. Shank Artukvich*, 751 F.2d 364 (10th Cir. 1985); *Roy Stone Transfer v. Teamsters, Etc., Local Union 22*, 752 F.2d 949 (4th Cir. 1985); *Buckeye Cellulose v. District 65, Div. 19, Etc.*, 689 F.2d 629 (6th Cir. 1982); *Bro. of Railroad Signalman v. Louisville and N.R. Co.*, 688 F.2d 535 (7th Cir. 1982); and *Resilient Floor, Etc. v. Welco Mfg. Co., Inc.*, 542 F.2d 1029 (8th Cir. 1976).

[3] Petitioner implies that the Eighth Circuit's decision below is inconsistent with another recent decision of the same Court. (Pet. 13); See *Zeviar v. Local No. 2747, Airline, Etc., Employees*, 733 F.2d 556 (8th Cir. 1984). That suggestion is frivolous. The Eighth Circuit's denial of Petitioner's request for rehearing *en banc* conclusively undermines any suggestion of such a conflict.

cision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960), which was relied upon by the majority in the Court of Appeals decision. The Court stated:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies." *Id.* at 597.

Thus, in two cases cited by Petitioner, the courts held that where the collective bargaining agreement contains no provisions as to remedies, the arbitrator is free to fashion his own remedy. *Knox Porcelain Corp. v. Teamsters Local U. No. 519*, 504 F. Supp. 284 (E. D. Tenn. 1980) and *Peter Cooper Corp. v. United Electric, Radio, Etc.*, 472 F. Supp. 692 (E. D. Wisc. 1979).

There is no provision in the BRAC Agreement specifically addressing a situation where the charges against an employee were found to be less than totally sustained because the employee was not *solely* responsible for his or her breach of the collective bargaining agreement. Further, there is no language evidencing a clear intent to deny a Public Law Board any latitude of judgment in formulating a remedy appropriate to the circumstance. Here, as in *Knox Porcelain* and *Peter Cooper*, the Public Law Board properly exercised its authority to interpret the particular collective bargaining agreement and to fashion an appropriate remedy.

There is no principle of law or element of the BRAC Agreement that bars an award of reinstatement without

back pay. Thus, in *Lynchberg Foundry Company v. United Steel Workers,* supra, the Fourth Circuit rejected the argument that an arbitrator had exceeded his authority in awarding reinstatement without back pay by stating:

> "This rigid interpretation of the arbitrator's scope of authority is not warranted and would be acceptable only if a contract expressly forbade the arbitrator to exercise any discretion in fashioning this award. . . The question of contract interpretation here is whether reinstatement with full pay represents the sole remedy for an employee who has suffered an injustice, or whether it merely marks the outer limits within which an arbitrator may fashion a remedy appropriate to the circumstances. In the absence of language evidencing a clear intent to deny the arbitrator any latitude of judgment, the arbitrator is the one to answer this question." *Id.* at 261.

The Fifth Circuit addressed the question in *Airline Pilots Ass'n., Intern. v. Eastern Airlines, Inc.,* supra. There, plaintiff sought to have a Public Law Board award vacated. The Public Law Board had issued an award ordering an employee reinstated, without back pay, for additional training. The Circuit Court reversed the lower court's decision vacating the Public Law Board's award in part. In doing so, the Circuit Court held that:

> "A wide variety of situations may arise, many of which may never have been considered by the draftsmen of the bargaining agreement. The instant case is an example of just such a situation. The training program had its faults; Aponte had his share of inadequacies. Faced with this setting, the Board fashioned a remedy which it considered appropriate: reinstatement without full benefits. There can be no doubt that the Board acted within the ambit of its authority. Consequently, we may look no further." *Id.* at 1324.

The Eighth Circuit addressed the question of whether a Public Law Board had authority to exercise its discretion in formulating a remedy in *Zeviar v. Local No. 2747, Airline, Etc., Employees,* 733 F.2d 556 (8th Cir. 1984), which is cited by the majority of the Court as controlling the instant case. In *Zeviar,* the plaintiff was discharged for insubordination for refusing to take an assigned flight. The arbitration award plaintiff sought to have reviewed ordered her reinstated with partial back pay. The arbitrator based the award on his finding, as in this case, that neither party was completely blameless. On appeal, plaintiff argued, as does Petitioner in this case, that partial exoneration required, under the terms of the collective bargaining agreement, reinstatement with back pay. In rejecting that argument, the Circuit Court held:

> "In our view, the award did not exceed the scope of the Board's authority. Although the chairman found no insubordination, he did not consider Zeviar to be fully exonerated in the sense of bearing no responsibility for her discharge and lost wages. In the absence of full exoneration, section 21.C.2 does not require an award of full back pay. Thus the Board had authority to exercise its discretion in formulating a remedy, and the award drew its essence from the collective bargaining agreement." *Id.* at 559.

In sum, it is clear that the majority in the Court of Appeals decision was correct in its holding that Public Law Board No. 3314 had authority to exercise its discretion in formulating a remedy in this case, and that the award drew its essence from the collective bargaining agreement. Therefore, the petition for certiorari must be denied.

———o———

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

STATEMENT REQUIRED BY RULE 28.1

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of the Union Pacific Corporation, a publicly traded holding company. Union Pacific Railroad Company's subsidiaries and affiliates are as follows:

Alameda Belt Line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Automated Monitoring & Control International, Inc.
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline, Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company

Chicago & Western Railroad Company
Chicago Heights Terminal Transfer
Railroad Company
Delta Finance Company, Ltd.
Denver Union Terminal Railway
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson
Railway Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Railroad Company
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad
& Navigation Company
Overthrust Pipe Line, Inc.
Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe Line, Inc.

Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Pueblo Union Depot and Railroad Company
Quality Aggregate Company
R M Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Sacramento Northern Railway
Southern Illinois and Missouri Bridge Company
Spokane International Railroad Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Tidewater Southern Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industries Corporation
Upland Industrial Development Company
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited

Weatherford Mineral Wells and Northwestern Railway Company
Western Pacific Railroad Company
Winton Coal Company
Yakima Valley Transportation Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LUANN K. WALSH,	)	
	)	
Plaintiff,	)	
	)	CV 83-0-806
vs.	)	
	)	ORDER
UNION PACIFIC	)	
RAILROAD COMPANY,	)	(Filed Mar. 20, 1985)
et al.,	)	
	)	
Defendants.	)	

This matter is before the Court upon defendant Carrier's motion to reconsider (filing 56) this Court's order (filing 52) entered on January 25, 1985, granting in part the plaintiff's and BRAC's System Board 106's motions for summary judgment (filings 29 and 31). The Court, being fully advised in the premises, finds that the Carrier's motion should be denied.

In filing 52, the Court held that the decision of Public Law Board No. 3314's award no. 4, which reinstated the plaintiff as the Carrier's employee but denied her claim for back pay, failed to draw its essence from the bargaining agreement. *Walsh v. Union Pacific Railroad*, No. CV 83-0-806, Order at 5-6 *citing Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259 (4th Cir. 1968) and *Epple v. Union Pacific Railroad*, 558 F. Supp. 63 (D. Colo. 1983). In this the Carrier contends the Court erred citing *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees, IBT*, 733 F.2d 556 (8th Cir. 1984).

In *Zeviar,* the Eighth Circuit, relying in part on *Lynchberg* and *Epple* declined to award full back pay to an employee who had been accused of insubordination. *See Zeviar,* 733 F.2d at 558. In doing so, the *Zeviar* court specifically observed that:

> although the chairman [of the Labor Board] found no insubordination, he did not consider Zeviar to be fully exonerated in the sense of bearing no responsibility for her discharge and lost wages. In the absence of full exoneration, section 21.C.2 does not require an award of full back pay.

Zeviar, 733 F.2d at 559. In *Zeviar* the flight attendant, after being reprimanded, refused to fly, therefore failing to mitigate her actions. This wrongful act was the basis of the Court's refusal to award complete back pay.

This Court is compelled to distinguish *Zeviar* for the same reason it distinguished *Lynchberg* and *Epple* in its earlier decision. *See Walsh,* No. CV 83-0-806 at 5-6.

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the aribtrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); *International Brotherhood of Electrical Workers Local Union No. 53 v. Sho-Me Power Corp.,* 715 F.2d 1322, 1325 n.1 (8th Cir. 1983); *Lackawanna Leather Co. v. United Food & Commercial Workers International Union,* 706 F.2d 228, 230 (8th Cir. 1983).

In the present case, as the Court noted previously, it would have been impossible for the plaintiff to correct a situation that she was not aware of. Because her conduct was not culpable to any degree, *Zavier*, 733 F.2d at 558 (employee accused of insubordination temporarily leaves job); *Lynchberg*, 404 F.2d at 259 (employee falsified business records); and *Epple*, 550 F. Supp. at 63 (employee vandalized company property), are simply inapposite.

Accordingly,

IT IS ORDERED that defendant Carrier's motion for reconsideration (filing 56) is denied.[1]

DATED this 20th day of March, 1985.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

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[1] The Carrier also argues that this Court erred in not granting its motion for summary judgment on the issue of conspiracy as set forth in plaintiff's first claim for relief. The Court does not necessarily agree with the footnote set forth in defendant BRAC System Board 106's brief in opposition to the Carrier's motion to reconsider (at p.2), which argues that the issue of conspiracy is now moot. The Court does, however, choose to exercise its discretion and again decline to grant the Carrier's motion for summary judgment on the question of conspiracy. Even if the district court is convinced that the moving party is entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, in order that the case can be fully developed at a later date. McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1977).